Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

ROBERT LAWRENCE PAYNE

V.

EDWARD W. MURRAY, DIRECTOR, ETC.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT

FOR THE COMMONWEALTH OF VIRGINIA

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57

QUESTIONS PRESENTED

I.

WHETHER THE SUPREME COURT FOR THE COMMONWEALTH OF VIRGINIA ERRED IN NOT CONSIDERING PETITIONER'S PETITION FOR A WRIT OF HABEAS CORPUS BECAUSE OF INEFFECTIVE ASSISTANCE OF DEFENSE COUNSEL, IN THAT THE CIRCUIT COURT ASSUMED JURISDICTION BY ACCEPTING SAID PETITION?

II.

WHETHER THE SUPREME COURT FOR THE COMMONWEALTH OF VIRGINIA ERRED IN NOT CONSIDERING PETITIONER'S PETITION GRANTING PETITIONER THE OPPORTUNITY TO WITHDRAW HIS GUILTY PLEA BECAUSE IT WAS NOT A VOLUNTARY AND INTELLIGENT WAIVER OF HIS CONSTITUTIONAL RIGHTS, IN THAT THE CIRCUIT COURT ASSUMED JURISDICTION BY ACCEPTING SAID PETITION?

III.

WHETHER THE SUPREME COURT FOR THE COMMONWEALTH OF VIRGINIA ERRED IN NOT CONSIDERING PETITIONER'S PETITION BECAUSE OF INEFFECTIVE ASSISTANCE OF DEFENSE COUNSEL DUE TO A PERSONAL CONFLICT OF INTEREST, IN THAT THE CIRCUIT COURT ASSUMED JURISDICTION BY ACCEPTING SAID PETITION?

IV.

WHETHER THE SUPREME COURT FOR THE COMMONWEALTH OF VIRGINIA ERRED IN NOT CONSIDERING PETITIONER'S PETITION BECAUSE SEVERAL SECTIONS OF THE VIRGINIA CODE WITH REGARD TO WIRETAPS WERE VIOLATED IN HIS CASE, IN THAT THE CIRCUIT COURT ASSUMED JURISDICTION BY ACCEPTING SAID PETITION?

V.

WHETHER THE SUPREME COURT FOR THE COMMONWEALTH OF VIRGINIA ERRED IN NOT CONSIDERING PETITIONER'S PETITION, IN THAT THE CIRCUIT COURT ASSUMED JURISDICTION BY ACCEPTING SAID PETITION AND THEN ERRED IN DISMISSING HIS PETITION?

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PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT

FOR THE COMMONWEALTH OF VIRGINIA

Petitioner, Robert L. Payne, respectfully request that a Writ of Certiorari be issued on review of a judgement and opinion of the Supreme Court for the Commonwealth of Virginia in the

above-captioned proceeding on the 15th of August 1994.

Petitioner by plea of guilty to the charge of conspiracy to distribute controlled substances on August 4, 1981 (Petitioner at all times maintained he was not actually guilty of the charge.) and was sentenced by the Honorable Kenneth E. Trabue to ten (10) years (seven years suspended) imprisonment to be followed by five (5) years probation. On April 10, 1991, the aforementioned conviction for conspiracy was used to enhance a sentence imposed by the United States District Court. Petitioner then filed a *pro se Petition for Writ of Error Coram Nobis* or in the alternative *Petition for Writ of Habeas Corpus* as to his 1981 conviction.

OPINION BELOW

The opinion of the Supreme Court for the Commonwealth of Virginia in its unpublished Judgement is reprinted in Appendix A hereto attached page 1a. No petition for rehearing was filed.

JURISDICTION

The judgement of the Supreme Court for the Commonwealth of Virginia was entered on the 15th day of August, 1994. This Court's jurisdiction is invoked under Rules of the Supreme Court, Rules 10.1(b)(c) and 14.1(e) and the Constitution for the United States of America.

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the Constitution for the United States provides: "No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *.

The Sixth Amendment to the Constitution for the United States provides: "In all criminal prosecutions, the accused shall

enjoy the right to a speedy and public trial, * * * to be confronted with the witnesses against him; * * * and to have Assistance of Counsel for his defense."

The Fourteenth Amendment to the Constitution for the United States provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; * * *.

STATEMENT OF THE CASE

On August 4, 1981, Petitioner, Robert Lawrence Payne, entered a plea of guilty to the charge of conspiracy to distribute controlled substances. The Honorable Kenneth E. Trabue presided at the plea hearing in the Circuit Court for the County of Roanoke. Although Petitioner did enter the guilty plea, he maintained at all times that he was not actually guilty of the charge.

In November, 1981, Petitioner was sentenced by the Honorable Kenneth E. Trabue to ten (10) years (seven years suspended) imprisonment to be followed by five (5) years probation.

On April 10, 1991, the forementioned conviction for conspiracy was used to enhance a sentence imposed by the Untied States District Court. Petitioner then filed a *pro se Petition for Writ of Error Coram Nobis* or in the alternative *Petition for Writ of Habeas Corpus* as to his 1981 conviction. This petition was eventually denied by the Circuit Court for the Roanoke County on January 6, 1994. *(See* Appendix B at 2a.)

Petitioner then filed a *Notice of Appeal to the Supreme Court of Virginia* on January 25, 1994. On the 15th of August, 1994, the Supreme Court for the Commonwealth of Virginia refused the petition for appeal as touching upon the ruling from the Circuit Court of Roanoke County. The Court held "that habeas corpus does not lie in th[at] matter. Th[at] appellant is not being detained under a Virginia order and therefore he is not

entitled to habeas relief.

REASON FOR GRANTING WRIT

The Supreme Court should grant certiorari because the Supreme Court for the Commonwealth of Virginia denied Petitioner's right to due process in violation of the Fifth and Fourteenth Amendments to the Constitution for the United States of America.

STATEMENT OF FACTS

In July, 1980, while Petitioner was residing in the State of Florida, agents of the Virginia State Police were engaged in an investigation of Betty Joyce Kidd Flora, a resident of Virginia. During this investigation the police placed an electronic interception on Flora's phone.

Petitioner did know Flora, as she was an ex-girlfriend. During the time of the investigation and the electronic intercept, Petitioner did have several telephone conversations with Flora which were intercepted by the police.

While Petitioner was in Florida, he had a telephone number which was non-published. Petitioner was not subject to the Commonwealth of Virginia's intra-state investigation, and the Commonwealth did not have authority to obtain his non-published telephone number within the State of Florida. Furthermore, although the Virginia Police did obtain an order authorizing them to set up the electronic interception, they abused that order when they failed to properly follow Virginia Code with relation to wiretaps.

In September, 1980, Petitioner moved from the State of Florida to the Commonwealth of Virginia. On November 3, 1980, Petitioner was arrested by Virginia authorities and charged with conspiracy to distribute or possess controlled substances of a Class II nature. Petitioner was represented during those

proceedings by two (2) attorneys. Robert T. Adams, a practicing attorney in the State of Florida, was retained by Petitioner as lead-counsel. Charles V. Hoback, a practicing attorney in the Commonwealth of Virginia was retained by Petitioner as co-counsel with the intent that he would do the "leg work" in the case. During the course of the proceedings, Petitioner actually received little or no representation from Adams, and the representation he received from Hoback was inadequate.

Finally, on August 4, 1981, Petitioner entered an "Alford Plea" based on the advice of Mr. Hoback. Petitioner thus plead guilty to the charge, but he still maintained that he was actually innocent.

Petitioner did not appeal that conviction at the time, but he has since been able to obtain evidence which has lead him to appeal it now.

I. WHETHER THE SUPREME COURT FOR THE COMMONWEALTH OF VIRGINIA ERRED IN NOT CONSIDERING PETITIONER'S PETITION FOR A WRIT OF HABEAS CORPUS BECAUSE OF INEFFECTIVE ASSISTANCE OF DEFENSE COUNSEL, IN THAT THE CIRCUIT COURT ASSUMED JURISDICTION BY ACCEPTING SAID PETITION?

The Sixth and Fourteenth Amendments to the Constitution for the United States guarantee that criminal defendants shall have the right to the assistance of counsel in their defense. This Court has recognized that this right to counsel is the right to the effective assistance of counsel. *See McMann v. Richardson*, 397 U.S. 759, 771, no. 14, 90 S.Ct. 1441, 1449, no. 14 (1970). This right to effective assistance of counsel has also been recognized in the court of the Commonwealth of Virginia.

See *Smith v. Thompson*, 1 Va.App. 407, 339 S.E.2d 556 (1986). These courts have also recognized that counsel can deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance." *See* *Strickland v. Washington*, 446 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984); citing *Cuyler v. Sullivan*, 446 U.S. 334, 344, 100 S.Ct. 1708, 1716 (1980).

The benchmark for judging claims of ineffective assistance of counsel was set out by this Court in *Strickland*, *Id.* In that case, this Court held that in order for counsel's assistance to be found to have been ineffective, the following two (2) factors must be established:

(1) That the defendant must show that counsel's performance was deficient. (466 U.S. at 687) This means that counsel's conduct must have fallen below an objective standard of reasonable professional performance; (466 U.S. at 688) and

(2) That the defendant must show that the deficient performance prejudiced the defense. (466 U.S. at 687) This can be demonstrated by showing that, but for the counsel's errors, there is a reasonable probability that the results of the proceedings would have been different. (466 U.S. at 694)

This Court then summarized the test by stating merely that the defendant must "show that counsel's performance was so deficient that counsel was not functioning as 'counsel' guaranteed to defendant by the Sixth Amendment, and that this deficient performance prejudiced the defense." *Id.* This *Strickland* test has been repeatedly cited by the Supreme Court of Virginia as the proper standard for judging claims of ineffective assistance of counsel. *See*, *Murray v. Griffith*, 243 Va. 384, 416 S.E.2d 219 (1992); *Correll v. Commonwealth*, 232 Va. 454, 352 S.E.2d 352 (1987); and *Frye v. Commonwealth*, 231 Va. 370, 345 S.E.2d 1 (1986). Furthermore, in the case of *Bowles v. Nance*, 236 Va.

310, 374 S.E.2d 19 (1988), the Supreme Court of Virginia found that the *Strickland* test also applies to claims of ineffective assistance of counsel arising out of the plea process. (*citing*, *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366 (1985).

Both of the *Strickland* test can be met in the instant case, as the performance of Petitioner's defense counsel was deficient and that deficient performance did prejudice Petitioner's case.

1. Deficiency of Defense Counsel's Performance

First of all, Petitioner submits that his lead counsel, Robert Adams, was really nothing more than an absentee counsel. Adams never filed any pleading on behalf of Petitioner and never made a single appearance to represent him. Such a lack of effort cannot be considered to constitute effective representation.

The rest of this section is devoted to detailing the specific inadequacies of the representation received from co-counsel Charles Hoback.

(a) Withheld information from client.

Petitioner first submits that the performance of defense counsel Hoback was deficient as a result of his failure to fulfill his duty of keeping Petitioner properly informed.

In the *Strickland* case, this Court recognized this duty. The Court there stated that "[f]rom counsel's function as assistance to the defendant derived the overreaching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution" 466 U.S. at 688, 104 S.Ct. at 2065. The *Strickland* court also noted generally that in determining the perimeters of the range of reasonable professional assistance, "[p]revailing norms of practice as reflected in American Bar Association standards an the like, *e.g.*, ABA *Standards for Criminal Justice* 4-1.1 to 4-8.6 (2d ed. 19809 ("The Defense Function"), are guides to determining what is reasonable. * * *" *Id.* Within these standards mentioned, there are two (2)

standards which apply to this particular situation. Standard 4-3.8 provides that "[t]he lawyer has a duty to keep the client informed of the developments in the case and the process of preparing the defense." Then, Standard 4-6.2(a) adds that "[i]n conducting discussions with the prosecutor the lawyer should keep the accused advised of developments at all times and all proposals made by the prosecutor shall be communicated promptly to the accused."

In the instant case, however, Petitioner's co-counsel Charles Hoback failed to meet his obligation to keep Petitioner informed and actually withheld important information from Petitioner. Prior to Petitioner's entry of his guilty plea, Mr. Hoback knew that the Commonwealth's attorney had not turned over all the recorded telephone conversations obtained through the use of wiretap. Several of the recordings that were withheld by the attorney for the Commonwealth contained exculpatory information that would have been very useful in Petitioner's defense. Mr. Hoback's own notes show that he was aware of the existence of this exculpatory evidence before Petitioner entered his guilty plea. *(See* Appendix C at 3a.) Furthermore, during Petitioner's plea hearing the Commonwealth admitted that certain conversations had been withheld from the defense. At the hearing the Commonwealth stated the following: "And only conversations have been provided to counsel for the defendant {Payne} are those that we, the Commonwealth through it's agent considered to be pertinent conversations." (*See* Transcripts of Plea Hearing at 18.) Although the prosecutor denied Petitioner his legal access to the transcripts of all other co-defendant's he unlawfully referred to them in presenting the Commonwealth's case. (Plea Hearing Transcripts at 23: "It is shown in this transcripts, as it is shown in others.") Yet, despite Mr. Hoback's knowledge that exculpatory evidence existed and had been withheld by the Commonwealth, Mr. Hoback never made a reasonable effort to obtain that evidence. Furthermore, he never informed Petitioner that such evidence had been withheld. Mr.

Hoback thus advised Petitioner to plead guilty without ever informing him that there was potentially exculpatory evidence in the possession of the commonwealth. This conduct by Mr. Hoback clearly violated his duty to keep the defendant informed of important developments in the case.

(b) Failure to file motions and make objections.

In the ABA *Standards for Criminal Justice*, Standard 4-1.1(b) provides that "[t]he basic duty the lawyer for the accused owes to the administration of justice is to serve as the accused's counselor and advocate with courage, devotion, and to the utmost of his or her learning and ability and according to the law." The ABA *Model Rules of Professional Conduct* and the *Model Code of Professional Responsibility* also adds some guidance. Rule 1.3 of the Model Rules require that "[a] lawyer shall act with reasonable diligence and promptness in representing a client;" and Disciplinary Rule 6-101(3) of the Model Code states that "[a] lawyer shall not neglect a legal matter entrusted to him." Petitioner thus submits that as part of reasonably competent representation, defense counsel has an obligation to make the necessary objections and file appropriate motions on his clients behalf. Courts of Virginia have made findings that support this contention. In the case of *Stokes v. Warden*, 226 Va. 111, 306 S.E.2d 882 (1983), the court found that trial counsel's performance did not meet the standard of reasonable competence where counsel failed to object to an instruction which this Court had condemned seven (7) months earlier.

Petitioner submits that Mr. Hoback's performance also fell below the standard of reasonable competence in that he failed to make certain obvious objections and failed to file certain motions on Petitioner's behalf.

First, Mr. Hoback knew that the Commonwealth was only able to obtain Petitioner's identity as a result of the unlawful use of a wiretap. In doing so, the Commonwealth specifically violated Virginia Code § 19.2-68 (7)(d)(4), (8)(a), and (9)(iv). Hoback's knowledge of this wiretap violation is revealed in his

own work notes. *(See* Appendix C at 3a.) Despite his knowledge of this violation of Petitioner's right, Hoback failed to move for suppression of the evidence gained as a result of the illegal wiretap.

Second, Hoback was later specifically instructed by lead counsel Robert T. Adams to file a Supplemental Motion to Suppress *(See* Appendix D at 4a.) and a Motion to Appear as Co-counsel. *(See* Appendix E at 10a.) All Hoback had to do was to file these motions as they had already been prepared by Adams. Not only did Hoback fail to file these motions; however, he has since denied any knowledge of their existence. It was only several years later that Petitioner was able to obtain the actual motions.

Third, lead-counsel Adams also directed Hoback to file a Motion of Prohibition. *(See* Appendix F at 12a.) Once again, however, Hoback either failed or refused to file the appropriate motions.

Finally, as already established *supra* Hoback was fully aware that the Commonwealth had withheld certain conversations that had been obtained via the wiretaps on Betty Joyce Kidd Flora's telephone. Hoback further knew that this was in direct violation of the Court Order requiring the Commonwealth to turn over the communications. *(See* Appendix G at 13a.) Yet Hoback never made any objections to this violation by the Commonwealth. Hoback, never, even objected to the Commonwealth's statement during the plea hearing that all the conversations had been turned over to the Appellant.

(c) Failure to make reasonable investigation.

It is very clear that defense counsel does have the responsibility of making a reasonable amount of pretrial investigation and preparation. This Court, the Supreme Court of the Commonwealth of Virginia, and the Courts of the Fourth Circuit and the American Bar Association Standards all agree on this point. In *Strickland*, this Court recognized that "[c]ounsel has a duty to make reasonable investigation or to make a

reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691, 104 S.Ct. at 2066. In *Murray v. Griffith*, 243 Va. 384, 398, 416 S.E.2d 219 (1992), the Virginia Supreme Court wrote similarly that "[i]n order to furnish constitutionally effective representation, 'counsel must conduct a reasonable amount of pretrial investigation' so that counsel's trial decisions 'will reflect informed deliberation'." (*citing Virginia Dept. of Corrections v. Clark*, 227 Va. 525, 318 S.E.2d 399 (1984).) Next, in the Fourth Circuit case of *Hyman v. Aiken*, 824 F.2d 1405, 1416 (1987), the court held that were counsel failed to do basic legal research, to review the testimony of key witnesses - including their own client - and to be familiar with readily available documents necessary to an understanding of their client's case, counsel's performance clearly fell below the objective standard of reasonable representation required by *Strickland*. Finally, ABA Standard 4-4.1 provides that "[i]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities."

In the instant case, Hoback did not make an adequate pretrial investigation.

First, Hoback knew that Petitioner was in the hospital during part of the time in which he was alleged to have been involved in telephone conversations obtained by wiretaps. Petitioner thus could not have been a party of those conversations. Hoback's notes again show his knowledge of these facts. (*See* Appendix H at 14a.) Hoback, however, failed to make any kind of an investigation into this possible defense.

Second, Hoback never attempted to obtain a voice print of Petitioner as a possible way of showing that he was not the person involved in the recorded communications.

Third, Hoback refused to contact any of the other

defendants in the case in order to possible obtain exculpatory evidence from them.

Finally, Hoback had information indicating that the Commonwealth had coerced C&P Telephone Company Security together with Southern Bell Security to provide the Commonwealth to obtain confidential information from extra-territorial areas over which the Commonwealth had no jurisdiction. Furthermore, these companies then withheld phone recordings containing three exculpatory conversations from Petitioner until after the plea hearing, then took action to cover up this unlawful conduct. (*See* Appendix H at 14a.) Hoback, however, again failed to investigate this information sufficiently to use it in Petitioner's defense.

(d) Advice as to guilty plea.

Mr. Hoback's performance was also deficient in that he advised Petitioner to plead guilty despite the act that he knew such a plea would not be voluntary and intelligent.

This Court has held that for a guilty plea to be valid, it must represent "a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 164 (1070); *see Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct.1709, 1711 (1968). It is therefore the duty of defense counsel to make sure that a guilty plea is voluntarily and intelligently entered by the defendant. The ABA Standards provide some guidance with regard to advice from counsel to guilty pleas. Standard 4-5.1 provides the following:

"(a) After informing himself or herself fully on the facts and the law, the lawyer should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

(b) It is unprofessional conduct for the lawyer intentionally to understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea."

In this instance, Mr. Hoback's performance again fell below the objective standard of reasonableness. In order for Hoback to make sure that Petitioner could make a voluntary and intelligent decision as to a guilty plea, it would have been imperative that Hoback provide Petitioner with all the facts. As Petitioner has already stated, however, Hoback did not explain everything to him. Hoback never told Petitioner about the evidence withheld by the Commonwealth, the motions that should have been filed to suppress other evidence, or other possible exculpatory evidence. Instead, Hoback merely told Petitioner that he should plead guilty without providing him with enough information to make that decision for himself. Furthermore, Hoback knew that on the night prior to the plea hearing, Petitioner received a threat to his own life and to the life of his children. Hoback's knowledge of this threat is demonstrated by his following statements in the Plea Hearing transcripts at 7: "after explaining that to him in length and in view of one other development that was relayed to my client by someone else * * *" Hoback knew that as a result of this threat there was no way that a guilty plea could be truly voluntary, yet he did nothing to put the court on notice or to protect Petitioner's rights in this regard.

For all these reasons, Petitioner submits that Hoback's performance did fall below an objective standard of reasonableness.

2. Prejudice

Petitioner does also submit that Mr. Hoback's deficient performance did prejudice his defense. If Mr. Hoback had filed the appropriate motions as he was directed by Mr. Adams, then much of the Commonwealth's alleged evidence against Petitioner, which had been obtained though the illegal wiretap, would have been suppressed. Furthermore, if Mr. Hoback had met his obligation of keeping Petitioner fully informed and had conducted a reasonable pretrial investigation, Petitioner would have been in

a much different position when it came time to decide whether or not to plea guilty. For these reasons, Petitioner does submit that if it had not been for his counsel's errors, there is a reasonable probability that the results of these proceedings would have been different.

II. WHETHER THE SUPREME COURT FOR THE COMMONWEALTH OF VIRGINIA ERRED IN NOT CONSIDERING PETITIONER'S PETITION GRANTING PETITIONER THE OPPORTUNITY TO WITHDRAW HIS GUILTY PLEA BECAUSE IT WAS NOT A VOLUNTARY AND INTELLIGENT WAIVER OF HIS CONSTITUTIONAL RIGHTS, IN THAT THE CIRCUIT COURT ASSUMED JURISDICTION BY ACCEPTING SAID PETITION?

When a defendant in a criminal proceeding enters a plea of guilty, the defendant waives many of his or her constitutional rights. It is therefore understandable that courts have set up several safeguards to protect defendants from unknowing waiving those rights. In the case of *Harlow v. Murray*, 443 F.Supp 1327, 1332 (W.D. Va. 1978), the court explained that a guilty plead is,

> "a waiver by defendant of several constitutional protection, including the privilege against self incrimination, the right to trial by jury, and the right of confrontation. It is the most devastating, final and total waiver of rights in the criminal justice system. To be constitutionally valid, a guilty plea, like other waivers, must be voluntary, intelligent and made with an awareness of the relevant circumstances and likely consequences." (*Cites* omitted.)

This "voluntary and intelligent" requirement was stated a little bit differently by this Court in *North Carolina v. Alford*, *supra*. There it was required that a valid guilty plea must represent a "voluntary and intelligent choice among the alternative courses of action available to the defendant." 400 U.S. at 31, 91 S.Ct. at 164. In furtherance of this requirement of voluntary and intelligent waivers, the U.S. District Court for the Eastern District of Virginia recently recognized in the case of *Nesbitt v. United States*, 773 F.Supp. 795, 798 (ED Va. 1991), the additional requirement that the plea must be voluntary, not induced by threats, and made with the competent assistance of counsel. (*See Alford*, *supra*; and *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441 (1970).

Petitioner in the instant case submits that the guilty plea he entered was not a voluntary and intelligent waiver of his constitutional rights for two (2) reasons: first, the pleas were entered without the competent assistance of counsel; second, Petitioner was induced to make the plea as the result of a threat. These two issues will be addressed by Petitioner individually.

1. Ineffective Assistance of Counsel

Courts have consistently held that the effective assistance of counsel is imperative for a guilty plea to be constitutionally valid. In *Hammond v. United States*, 528 F.2d 15, 18 (4th Cir. 1975), reached the following conclusion in this regard.

> "If counsel was ineffective, it follows that Hammond's pleas were involuntary. The *Brady* Trilogy makes it perfectly clear that the *sine qua no* to a voluntary plea of guilty is the assistance of counsel 'within the range of competence required of attorneys in criminal cases." (*Cites* omitted.)

This decision was basically reiterated by this Court in *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366 (1985). In the *Hill* case, however, the Court further held that the two-part test from

Strickland, supra, applies to challenges to guilty pleas based on ineffective assistance of counsel 474 U.S. at 58, 106 S.Ct. at 370. This Court then noted that the first part of the test would remain exactly the same. *Id.*, therefore, Petitioner must show that his counsel's performance with regard to the guilty plea fell below an objective standard of reasonableness. *See* 466 U.S. at 687-688, 104 S.Ct. at 2065. The second part of the test was found to be a little different, and the Court explained the difference as follows:

> "The second, or 'prejudice', requirement on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the *prejudice requirement*, the defendant must prove that there is reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (474 U.S. at 59, 106 S.Ct. at 370)

As Petitioner has already established in section one of this Petition, both prongs of *Strickland* for ineffective assistance of counsel have been met in this case. The performance of Petitioner's co-counsel, Charles Hoback, was seriously deficient. Mr. Hoback withheld important information from Petitioner concerning developments in the case, he failed to make necessary objections and failed to file motions as directed by lead counsel, he failed to make a reasonable pretrial investigation, and he insisted that Petitioner plea guilty despite his continued insistence that he was innocent. As a result of all these inadequacies by Mr. Hoback, it is clear that defense counsel was not adequately prepared to take Petitioner's case to trial. As a court of the Fourth Circuit found in the case of *Via v. Superintendent, Powhatan Correctional Center*, 643 F.2d 167 (1981), where defense counsel was found to have been unprepared to try a case, said counsel is also inadequately prepared to advise his client

intelligently to plead guilty and accept a substantial sentence. Under these circumstances, the court held that defendant's counsel did not afford him representation "within the range of competence demanded of attorneys in criminal cases," and for that reason the defendant's plea of guilty was neither intelligent nor voluntary. *Id.* In the instant case, it is also clear that since defense counsel was not prepared to adequately defend Petitioner at trial, defense counsel was also not adequately prepared to advise Petitioner intelligently to plead guilty. Therefore, the performance of Mr. Hoback did fall below an objective standard of reasonableness.

It is also clear that Petitioner was in fact prejudiced by Hoback's deficient performance. As a result of the inadequacies of counsel, Petitioner was not aware of all the relevant circumstances of the case. Furthermore, because of defense counsel's failure to make a reasonable pretrial investigation, several avenues of defense were not available to Petitioner. Petitioner therefore submits that if it had not been for his counsel's errors in this case, he would not have pleaded guilty and would have insisted on going to trial.

2. Guilty Plea Was Induced by a Threat

Petitioner next submits that his guilty plea in this case was not voluntary as it was the direct result of a threat. On the night before Petitioner's plea hearing, the life of Petitioner and the lives of his children were threatened. (*See* Appendix I at 16a.) As a result of this threat, Petitioner was forced to enter the guilty plea. This fact helps to explain why Petitioner enter the guilty plea while still maintaining his claim of innocence. Furthermore, Mr. Hoback was fully aware of this threat and made no attempt to notify the court in order to protect Petitioner's rights.

3. The Trial Court Did Not Meet its Requirements for the Plea

Furthermore, Petitioner submits that the Court did not

meet its obligation to adequately address the defendant before accepting a guilty plea in order to make certain that the plea was in fact voluntary and intelligent decision made by the defendant with full knowledge of the relevant circumstances and likely consequences. Rule 3A:8 of the rules of the Supreme Court of Virginia required that "a circuit court shall not accept a plea of guilty or *nolo contendere* without first determining that the plea is made voluntarily with an understanding of the charge and the consequences of the plea." *Graham v. Commonwealth*, 11 Va.App. 133, 138, 397 S.E.2d 270 (1990). This Rule is very similar to Rule 11 of the Federal Rules of Criminal Procedure, and in fact, the courts of Virginia have actually stated the rule is substantially equivalent to the Federal Rule. *See Gardner v. Warden*, 222 Va. 491, 281 S.E..2d 876 (1981). In addition to the requirements of Rule 3A:8, Rule 11 also requires in paragraph (f) that the court "shall not enter a judgement upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." Fed.R.Cr.P. 11(f). The courts of Virginia have recognized the importance of the inquiry into the voluntariness and intelligent nature of a guilty plea. *See Mason v. Commonwealth*, 14 Va.App. 609, 419 S.E.2d 856 (1992) and *Stokes v. Slayton*, 340 F.Supp. 190 (W.D. Va. 1972). It is necessary for the courts to make these determinations before accepting a guilty plea because of the essential constitutional rights which are waived as a result of a guilty plea. This Court stated in *Brady v. Untied States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469 (1969):

> "the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial - a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."

In that case, the Court also discussed other elements necessary for a guilty plea to be accepted by a court. In this regard, this Court stated the following:

> "That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment." *Id.*

Shortly after the *Brady* case, however, this Court changed its position with regard to the necessary elements of a valid guilty plea. In *North Carolina v. Alford*, *supra*, the Court found that the express admission of guilt by a defendant is not a constitutional prerequisite to imposition of criminal penalty, and therefore, an individual accused of a crime may voluntarily, knowing and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in acts constituting the crime. The Court recognized, however, that such a situation would result in a natural conflict as a defendant could plead guilty to a charge while still maintaining that he is actually not guilty. Such a situation would seem to naturally involve a notion of injustice. To resolve this problem, the court noted the particular importance of a requirement in Rule 11 in such situations and stated that guilty pleas coupled with claims of innocence should not be accepted unless there is factual basis for the plea and until the judge has inquired into and sought to resolve the conflict between the defendant's waiver of trial and his claim of innocence. *Id.* There is thus somewhat increased burden placed on the judge in these cases in order to protect the rights of defendants.

In the instant case Petitioner did enter a guilty plea coupled with a claim of innocence, a plea now commonly referred

to as an *Alford* Plea. But the court failed to meet its burden of resolving the conflict. In fact, a review of the plea hearing transcripts will show that the court did not even realize the plea was an *Alford* Plea, as the court went through its "regular plea" colloquy. Further, the court failed to adequately investigate the situation in order to make a reliable determination as to whether it was a voluntary and intelligent decision by Petitioner to plea guilty despite protesting his innocence at the plea hearing and in the PSI, in which Petitioner stated, "he was not involved in any type of conspiracy." If the judge had adequately carried out his responsibility in this regard, he would have realized that this guilty plea was not a voluntary and intelligent decision made by Petitioner with sufficient awareness of the relevant circumstances and likely consequences. Moreover, the judge would have discovered that there was not an adequate factual basis to support the acceptance of this guilty plea.

Therefore, Petitioner submits that since the guilty plea in this case directly resulted from both the threat and the ineffective assistance of counsel he received, that guilty plea could not possibly be found to have been a voluntary and intelligent waiver of his constitutional rights. Furthermore, the court failed in its obligation to protect those rights. For these reasons, Petitioner requests that he be granted the opportunity to withdraw the guilty plea.

III. WHETHER THE SUPREME COURT FOR THE COMMONWEALTH OF VIRGINIA ERRED IN NOT CONSIDERING PETITIONER'S PETITION BECAUSE OF INEFFECTIVE ASSISTANCE OF DEFENSE COUNSEL DUE TO A PERSONAL CONFLICT OF INTEREST, IN THAT THE CIRCUIT COURT ASSUMED JURISDICTION BY ACCEPTING SAID PETITION?

In order to show ineffective assistance of counsel resulting from a conflict of interest, Petitioner must again satisfy the *Strickland* test. Thus the Petitioner must show that as a result of the conflict of interest, the defense counsel's performance fell below an objective standard of reasonableness and that Petitioner was prejudiced by that performance. *Carter v. Commonwealth*, 427 S.E.2d 736, 739 (1993).

The performance of Petitioner's counsel in this case did fall below an objective standard of reasonableness as a result of the conflict of interest. The best evidence as to the "objective standard of reasonableness" in this regard seems to come from the American Bar Association *Standards for Criminal Justice*, "The Defense Function," and from the American Bar Association *Model Rules of Professional Conduct.* First, there is *Standard 4-2.1*, entitled "Client Interest Paramount", which provides that "[t]he duties of the lawyer to a client are to represent the client's legitimate interests, and consideration of personal and professional advantage should not influence the lawyer's advice or performance." Along this same line, comment 6 to *Model Rule 1.7*,"Conflict of Interest," explains further that "[t]he lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee." Finally, *Standard 4-1.2* adds the following:

> "(a) Defense counsel should avoid unnecessary delay in the disposition of cases.
> (c) Defense counsel should not intentionally use procedural devices for delay for which there is no legitimate basis.
> (d) A lawyer should not accept more employment than the lawyer can discharge within the spirit of the constitutional mandate for speedy trials and the limits of the lawyer's capacity to give each client effective representation."

From all of this it is clear that defense counsel has a strict obligation to make sure that in the representation of client, the client's interest must remain paramount in the attorney's mind and the attorney's own interest must not be permitted to come into consideration.

In the instant case, however, Petitioner's counsel Mr. Hoback did not meet this obligation. It is clear that Mr. Hoback did permit his own interest to control his representation. Petitioner specifically informed counsel that he wanted the proceedings to be handled as quickly as possible. Despite this expressed statement of Petitioner's interest, however, Hoback repeatedly delayed the proceedings. On three (3) separate occasions (November 12, 1980, December 29, 1980, and February 5, 1981) Mr. Hoback went before the Hon. Fred L. Hoback, his father, in order to obtain continuances. All three of these continuances were obtained by Hoback without the consent or even the knowledge of Petitioner. Mr. Hoback's own interests were most benefitted by these significant delays in the proceedings. By thus putting his own interests ahead of Petitioner's right to a speedy trial, Mr. Hoback did render performance that was unprofessional. Hoback's representation therefore did fall below an objective standard of reasonableness.

Petitioner further submits that this deficient performance by defense counsel did prejudice his defense. If defense counsel had actually used the delays in order to investigate the Petitioner's case more fully or to prepare himself for trial, the delays might have benefitted Petitioner. It is clear from the inadequacies in defense counsel's pretrial investigation and preparation which were exposed in section one of this petition, however, that defense counsel did not use the delays for the benefit of Petitioner's case. Mr. Hoback obviously had taken on more than he could handle and had to use the delays to further his own interest in maintaining a client. In doing so, Hoback violated his professional obligation to Petitioner, and his ineffective assistance of counsel prejudiced Petitioner's case. Moreover, if it had not

been for the defense counsel's unprofessional errors, there is a reasonable probability that the result of the proceedings would have been different as the Petitioner most likely would not have plead guilty.

IV. WHETHER THE SUPREME COURT FOR THE COMMONWEALTH OF VIRGINIA ERRED IN NOT CONSIDERING PETITIONER'S PETITION BECAUSE SEVERAL SECTIONS OF THE VIRGINIA CODE WITH REGARD TO WIRETAPS WERE VIOLATED IN HIS CASE, IN THAT THE CIRCUIT COURT ASSUMED JURISDICTION BY ACCEPTING SAID PETITION?

Petitioner submits that the Attorney for the Commonwealth of Virginia violated several sections of the Virginia wiretap code and these violations substantially infringed upon Petitioner's right to due process of law.

A. Interception Not in Conformity with Order of Authorization

Petitioner first submits that the code of Virginia with regards to wiretaps was violated in his case as the interception itself was not in conformity with the order of authorization or approval that was granted by the Court.

Section 19.2-68(E) of the Code of Virginia requires the following:

> "Whenever an order authorizing interception is entered pursuant to this chapter, the order shall require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized object and the need for continued interception. Such reports

shall be made at such intervals as the judge shall require."

This requirement of progress reports to the authorizing judge is very important because it protects the privacy rights of citizens and seeks to avoid possible abuse of wiretap interception technology by authorities.

In the instant case, Marshall Coleman, Attorney General for the Commonwealth of Virginia, applied for the wiretap intercept order affecting Petitioner. The Order was granted by the Honorable Lawrence L. Koontz on July 1, 1980. The Order required that "the applicant or his authorized representative shall make reports to the Court at least every five days or, as the Court may otherwise require * * *" Despite the specific mandate of the Order, neither Attorney General Coleman nor any affirmatively authorized representative made the requisite reports to the Courts. This was in direct violation of the Court Order authorizing the wiretap interception as well as the code of Virginia. Furthermore, the judge in this instance neglected his obligation to oversee the use of the wiretap authorization. When a Court authorizes such a wiretap intercept, the code of Virginia puts the burden on the Court to ensuring that the wiretap is used only to the extent necessary to achieve the authorized objective of the wiretap intercept. *See* § 19.2-68(E). By failing to meet its burden of supervising the use of the wiretap it authorized in this instance, the Court here was also acting in violation of the Code of Virginia. The court did not address the question of jurisdiction by Attorney Adams. *(See* Appendix D at 4a.) There is also a question of whether or not a jury in Virginia can indict a resident of Florida for calls made from that residence in Florida.

The use of the wiretap intercept in this case was therefore illegal as it was neither in conformity with the order of authorization nor with the Code of Virginia with regard to wiretaps.

B. Failure to Disclose Intercepted Communications

Petitioner also submits that his rights were violated in this instance when the Attorney for the Commonwealth failed to disclose transcripts of the contents of all the intercepted communications that involved Petitioner. This conduct violated Petitioner's due process rights. In the case of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-7 (1963), this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

On January 8, 1981, Petitioner obtained an Order from the Court which required the following:

> Whereupon, counsel for the defendant having moved the Court for the production of copies of transcripts produced as a result of recordings of certain intercepted wire communications pursuant to the Orders of this Court of July 30, 1980, and August 29, 1980, and there being no objection by the Attorney or the Commonwealth, the Court ORDERS that the Attorney for the Commonwealth shall produce copies of said ***"transcripts of all conversations involving the defendant***." (Emphasis added.)

Despite this clear Court Order, however, the Attorney for the Commonwealth failed to turn over to Petitioner or his counsel "transcripts of all conversations involving the defendant." Of some 543 communications that were recorded pursuant to the authorization orders mentioned *supra*, the transcripts of only 32 conversations were ever disclosed to Petitioner. The prosecution was thus in direct violation of the Court Order.

Furthermore, the judge was again in violation here for not meeting his obligation as set out in the Code of Virginia § 19.2-68(7)(d)(4) provides in part that "[t]he judge, upon the filing of a motion, shall make available to such person or his counsel for inspection the intercepted communications, applications, and

orders." The Code thus puts the responsibility on the judge to make sure that such persons as filed the motion actually do have access to the communications. Here, however, the judge did not satisfy his responsibility. Petitioner's counsel did file the necessary motion in order to obtain copies of the intercepted communications. The Court granted the motion for disclosure, but failed to follow through with its obligation to make sure that the Attorney for the Commonwealth would actually disclose the transcripts of all communications involving Petitioner.

For these reasons, Petitioner submits that the conduct of the wiretap intercept and the circumstances surrounding the use and withholding of the conversations recorded as a result of the wiretap interception were in direct violation of the Code of Virginia. Therefore, the information gained therefrom should have been suppressed. The Petitioner further submits that had it not been for the ineffective assistance of counsel he received in his defense, a proper motion to suppress said evidence would have been filed during the pendency of his case.

V. WHETHER THE SUPREME COURT FOR THE COMMONWEALTH OF VIRGINIA ERRED IN NOT CONSIDERING PETITIONER'S PETITION, IN THAT THE CIRCUIT COURT ASSUMED JURISDICTION BY ACCEPTING SAID PETITION AND THEN ERRED IN DISMISSING HIS PETITION?

Petitioner submits that the court below committed several errors in dismissing his claim without giving him an opportunity to provide evidence to support the claim. Petitioner first submits that the court erred by not requiring the respondent to make a specific showing of particular prejudice resulting from the delay in Petitioner's filing of this claim. Second, the Petitioner submits

that the court erred by failing to apply the liberal standards which are traditionally afforded to *pro se* petitioners. Finally, Petitioner submits that the court erred by refusing to consider his reply brief.

A. Respondent Made No Showing of Prejudice

When a party moves for dismissal of a habeas petition on the grounds of prejudice resulting from a delay in the filing of the petition, the moving party is required to make a particularized showing of the prejudice it suffered. It is not sufficient for the party to merely make a conclusory statement that it was prejudiced by some delay. In the case of *Alexander v. State of Maryland*, 719 F.2d 1241 (4th Cir. 1983), the court found that "the mere passage of time is therefore not sufficient grounds to dismiss a petition under (Habeas) Rule 9(a); the state must make a particularized showing of prejudice to its ability to respond that arises from the petitioners's under delay in filing." *Id.* at 1246. *See also*, *McDonnell v. Estelle*, 666 F.2d 246 (5th Cir. 1982) and *Paprskar v. Estelle*, 612 F.2d 1003 (5th Cir. 1980).

The *Alexander* court then went on to add that the proper inquiry here is "whether the state was prejudiced due to unreasonable delay on part of the petitioner in filing his petition." 719 F.2d at 1246. In making this inquiry, the court found that the state had failed to make a showing of any specific prejudice "other than the prejudice inherent in even the briefest passage of time." *Id.* Based upon the filing, the court then held that the lower court had not abused its discretion in refusing the State's Motion to Dismiss on the grounds of prejudice.

In the instant case, the respondent also filed a motion to dismiss Petitioner's claim, and one of the grounds for that motion was prejudice. In the respondent's Motion to Dismiss, paragraph 5 reads as follows: "The respondent has been genuinely prejudiced by petitioner's delay in filing his habeas petition. This prejudice dictate's dismissal of the petition. *See Walker v. Mitchell*, 224 Va. 568, 299 S.E.2d 698 (1983)." The court then

granted the respondent's motion to dismiss. But the dismissal was erroneous, however, as the court never required the respondent to make the requisite particularized showing of prejudice to its ability to respond. Just as in the *Alexander* case, the respondent never made a particular showing of any specific prejudice "other than the prejudice inherent in even the briefest period of time." For this reason Petitioner submits that the dismissal of his Habeas Petitioner was erroneous.

B. Treatment of Pro Se Petition

Petitioner also submits that the court erred by failing to apply the liberal standards which are traditionally afforded to *pro se* petitioners.

This Court has repeated held that liberal standards should be applied to petitions which are filed *pro se*. In the case of *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct 285 (1976), the Court held as follows:

> "a *pro se* petition, however unartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

See also, *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594 (1972) and *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957).

Thus, the court in the instant case erred in dismissing Petitioner's habeas petition as it failed to apply the less stringent standard set out in these Supreme Court cases. As Petitioner has clearly shown in this Petition, it does not appear beyond doubt that he can prove no set of facts in support of his claim which would entitle him to relief. Therefore, Petitioner's habeas petition should not have been dismissed.

C. Court's Refusal to Consider Petitioner's Reply Brief

Before the court here dismissed Petitioner's habeas petition, Petitioner did file a reply brief. The court, however,

refused to consider that brief because it was received by the court clerk one day past its deadline. Petitioner submits that because of his status as a *pro se* petitioner at the time, the court should have considered the reply brief before dismissing the habeas petition.

In the case of *Houston v. Lack*, 266, 108 S.Ct. 2379 (1988), a *pro se* petitioner was attempting to file a notice of appeal from the denial of his motion for habeas corpus. This petitioner delivered the notice of appeal to prison authorities for forwarding to district court three (3) days prior to the filing deadline. The court, however, apparently did not receive the notice until one day after the deadline. for that reason the Court of Appeals dismissed the appeal as jurisdictionally out of time. On review of the case, this Court held that the notice of appeal should have been considered filed at the time the petitioner delivered it to prison authorities for forwarding to the clerk of court. The Court supported this decision by explaining that the prisoner's control over the processing of such documents necessarily ceases as soon as the hand he hands it over to prison authorities. Due to their incarceration, such *pro se* petitioners also lack the opportunity to take certain precautions that other litigants may take in order to ensure timely delivery to the clerk of the courts.

Petitioner asserts that the holding from *Houston* should be applied to his case due to the factual similarity. In this case, Petitioner's *pro se* reply brief was due to be filed with the clerk of court on January 4, 1994. Petitioner placed the brief in the prison mail on December 24, 1993, but the clerk of court did not receive the brief until January 5, 1994. Petitioner's brief was late by one day and the court refused to consider it. Just as the petitioner in *Houston* case, however, the instant Petitioner's control over the brief necessarily ceased as soon as it was turned over to prison authorities via the prison mail system. Since Petitioner is in prison and had no attorney representing him, he had no opportunity to file the reply brief with the clerk of court in

person. Petitioner therefore submits that his reply brief should have been considered as filed as soon as it was delivered to prison authorities. The Court thus erred in refusing to consider the reply brief before making its decision to dismiss Petitioners claim.

CONCLUSION

For the aforementioned reasons the Petitioner respectfully request that this Honorable Court grant this Writ of Certiorari.

Respectfully submitted,

Robert L. Payne

ROBERT LAWRENCE PAYNE
Reg. No. 02116-084
Petitioner, *Pro Se*
Post Office Box 4000 Unit Clay B
Manchester, KY 40962

APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 15th day of August, 1994.

Robert Lawrence Payne, Appellant,

against Record No. 940703
Circuity Court No. CL93000394

Edward W. Murray, Director, etc.
Appellee.

From the Circuit Court of Roanoke County

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of opinion that habeas corpus does not lie in this matter. The appellant is not being detained under a Virginia order and therefore he is not entitled to habeas relief. McClenny v. Murray, 246 Va. 132, 431 S.E.2d 330 (1993). Accordingly, the Court refuses the petition for appeal.

A Copy,
Teste:

David B. Beach, Clerk

By:

Deputy Clerk

A Copy teste: Steven A. McGraw, Clerk
Circuit Court, Roanoke County, VA
By Heather Haynes
Deputy Clerk

RECEIVED 9/7/94
/S/
STEVEN A. MCGRAW, CLERK

VIRGINIA:
IN THE CIRCUIT COURT OF ROANOKE COUNTY

ROBERT LAWRENCE PAYNE,
Petitioner,

v. File CL93000394

EDWARD W. MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

ORDER

Upon mature consideration of the petition of Robert Lawrence Payne for a writ of habeas corpus, the Motion of the respondent and the authorities cited therein, and a review of the record in the criminal case of Commonwealth v. Robert Lawrence Payne, which is made a part of the record in this matter, the Court finds, for the reasons stated in the Motion to Dismiss, that the petitioner is not entitled to the relief sought.

For the foregoing reasons, the Court is of the opinion that the petition for a writ of habeas corpus should be denied and dismissed; it is, therefore,

ADJUDGED and ORDERED that the petition for a writ of habeas corpus be, and is hereby, denied and dismissed, to which action of this Court the petitioner's exceptions are noted.

The Clerk is directed to forward a certified copy of this Order to the petitioner and to Thomas C. Daniel, Assistant Attorney General.

Entered: 1/6/94

/s/
JUDGE*

*Note: Cannot read Judges name.

HOBACK'S WORK NOTES

(Doctor (?)
on Nov. 17, 1981
(can't straighten it out.)
-no moved from ligaments -

(knee swollen up - etc.

19.2-68
para #8 A.
#7 last paragraph

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*(Copy of phone bills - shows at least 3 calls that we didn't get.)

IN THE CIRCUIT COURT OF THE
COMMONWEALTH OF VIRGINIA
IN AND FOR ROANOKE COUNTY, VIRGINIA
CRIMINAL CASE (Judge Kenneth E. Trabue)

COMMONWEALTH
OF VIRGINIA

Plaintiff,

vs

SUPPLEMENTARY
MOTION
TO
SUPPRESS

ROBERT LAWRENCE PAYNE

Defendant.

COMES NOW the Defendant and files this Supplementary Motion to Suppress evidence as grounds therefore would respectfully show:

1. That the Defendant, ROBERT LAWRENCE PAYNE, was indicted on November 3, 1980, for an alleged "conspiracy" offense.

2. That the Defendant, ROBERT LAWRENCE PAYNE, is an "aggrieved" person in that conversations, purportedly of his, were intercepted as a result of an intercept order issued by the Honorable Lawrence Koontz, dated July 1, 1980, and August 29, 1980, respectively.

3. That the Defendant, by filing this Supplementary Motion, seeks an Order of this Honorable Court suppressing the use as evidence any and all evidence against the Defendant derived directly or indirectly as a result of the aforesaid wire-intercept Orders on the grounds that: (a) the Order of authorization and accompanying Applications and Affidavit are

insufficient on their face; and (b) the interceptions were not made in conformity with the Law of the Commonwealth of Virginia and under the requirements of the Federal Standards pursuant to 18 U.S.C., Sections 2516, 2517, 2518, and 2519.

4. The factual basis for this Supplementary Motion is that on or about the 27th of June, 1980, Marshall Coleman, Attorney General for the Commonwealth of Virginia, verified an application for a wire-tap intercept Order substantiated by Affidavit of Trooper Counts of the Virginia State Police. The Honorable Lawrence L. Koontz issued the Order based upon the aforesaid Application and Affidavit on July 1, 1980. Pursuant to that Order, telephone conversations to and from 989-0943 (703) were commenced with recordings made by Virginia State Police as authorized in the Order. An Application for an Extension was made by Attorney General Coleman with supporting Affidavit of Trooper Counts, with Judge Koontz authorizing a thirty day extension on July 29, 1980. Thereafter, on Application of Attorney General Coleman supported by Affidavit, another extension was requested with Judge Koontz issuing the second extension Order on August 28, 1980, authorizing a fifteen day extension only. Copies of the initial Application, Affidavit and Order, together with subsequent extension Applications, Affidavits and Orders are attached hereto and incorporated herein by reference. That as a result of the monitoring of phone calls to and from 989-0943 (703), conversations were recorded attributed to the Defendant ROBERT LAWRENCE PAYNE and the phone number, (305) 581-6301, and others. That this Honorable Court conducted a hearing where testimony was taken regarding a Motion to Suppress on June 4, 1981. That by reason of the transcript made available after that hearing, discovery furnished by the Commonwealth and thorough review of the intercept Orders and related papers, additional matters are set forth in this Motion in support of the request for an Order of suppression.

5. That the Order for the wiretap interception dated

July 1, 1980, reflects that "the applicant or his authorized representatives shall make reports to the Court at least every five days or, as the Court may otherwise require . . . ." The Defendant would show that the testimony at the first hearing on the Motion to Suppress under oath reflects that State Police Officers made the reports as directed by the Court, but there is no showing that the applicant, Attorney General Coleman, made the reports, nor is there any affirmative showing that Attorney General Coleman authorized the State Police Officers to make the said reports.

6. That the Affidavit in the first Application for an Extension reflects that "over 300 drug related telephone conversations have been intercepted." That purported fact is refuted by the list of phone calls intercepted as part of the discovery showing that there were only 287 phone calls intercepted between July 1 and July 20, 1980.

7. The Affidavit for the second Request for an Extension reflects that from July 21 to August 23, 1980, there were "193 drug related telephone conversations intercepted," wherein that purported fact is disputed by the aforesaid list of phone calls provided the Defendant which shows that there were only 182 such possible calls through August 23. A copy of the list of phone calls provided as part of the discovery is attached hereto and incorporated herein by reference.

8. That the first Request for Extension reflects in paragraph 7 of the Application certain names, not including the Defendant ROBERT LAWRENCE PAYNE, stating that others are unknown or unidentified, but the Affidavit in support of the Application for Extension shows in the "summary of investigation to date" that in fact ROBERT LAWRENCE PAYNE was identified.

9. That all Orders authorizing wire interceptions as previously referred to authorize and direct the Chesapeake and Potomac Telephone Company of Virginia to assist and furnish Virginia State Police with information and facilities necessary to

accomplish the objectives of the Order and further to furnish information as to the locations and identity of telephone subscribers revealed by the interception. The Defendant would respectfully show that the number attributed to the Defendant PAYNE, 305-581-6301, was unpublished and that any information provided regarding that subscriber would not have originated with the authorized phone company, but rather another telephone company, to-wit: Southern Bell Telephone Company. It is the Defendant's position that the wire intercept statute must be strictly interpreted together with Orders relating thereto and that no other phone company other than Chesapeake and Potomac Telephone Company was directed or authorized to release information gathered as to the use of said number.

10. That the transcripts of phone calls provided by the Commonwealth show the lack of "minimization" as required under Federal and Commonwealth standards as well as the Orders authorizing the interception.

11. That the original interception Order and extensions were improper in that they were general in nature, apparently authorizing interceptions of conversations beyond the jurisdiction of this Honorable Court.

12. The Defendant recognizes this Honorable Court's ruling on the original Motion to Suppress regarding the validity of the interception Order and Extensions and its findings, respectfully suggesting that a review of the transcript of testimony of the hearing conducted on June 4, 1981, would be appropriate and that the Order and Extensions are insufficient particularly regarding:

a. Failure of other investigative techniques.
b. determination of probable cause
c. Minimization.
d. Failure to substantiate the "five day" reports.

WHEREFORE the Defendant respectfully moves this Honorable Court to conduct a hearing upon this Supplementary

Motion to Suppress where sworn testimony can be presented in support of this Motion, or in the alternative, to allow the matters set forth herein to be argued prior to testimony and tangible evidence being introduced during the trial regarding matters recorded or learned by reasons of the recordings made pursuant to the intercept Orders.

CHARLES VAN HOBACK
Attorney for Defendant
115 North Market Street
Salem, Virginia 24153
703-387-2699

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion was delivered to JOHN LAMPROS, ESQUIRE, Commonwealth Attorney, courthouse, Sale, Virginia, on this ___ day of July, 1981.

CHARLES VAN HOBACK

IN THE CIRCUIT COURT OF THE
COMMONWEALTH OF VIRGINIA
IN AND FOR ROANOKE COUNTY, VIRGINIA
CRIMINAL CASE (Judge Kenneth E. Trabue)

COMMONWEALTH
OF VIRGINIA

Plaintiff,

vs

MOTION FOR
AUTHORIZATION
TO APPEAR AS
CO-COUNSEL

ROBERT LAWRENCE PAYNE

Defendant.

COMES NOW the undersigned Florida attorney and moves this Honorable Court for permission to appear as co-counsel for the Defendant, Robert Lawrence Payne, in the above cause and as grounds would respectfully show unto this Court:

1. That Charles Van Hoback is the attorney of record for the Defendant, Robert Lawrence Payne.

2. That the undersigned attorney has personally conferred in Roanoke with Mr. Hoback and that Mr. Hoback has no objection to the undersigned appearing as co-counsel with him in the defense of the above cause.

3. That Charles Van Hoback evidences his consent by the stipulation and signature appearing on this Motion.

4. That the undersigned attorney has been a member of the Florida Bar since February, 1954; is in good standing as an attorney in the State of Florida and authorized to practice in all the Federal District Courts in Florida; the United States Court of

Appeals for the Fifth Circuit and the United States Supreme Court.

5. That this request for authority to appear is solely for this isolated cause.

6. That the Defendant, Robert Lawrence Payne, specifically requests the undersigned attorney to appear as co-counsel on his behalf in the above cause.

WHEREFORE the undersigned attorney respectfully moves this Honorable Court for the authority to appear as co-counsel with Charles Van Hoback in the defense of the above cause.

ROBERT T. ADAMS, JR.
P. O. Box 981
Marianna, Florida 32446
904-526-3775

STIPULATION

I, CHARLES VAN HOBACK, hereby acknowledge that I have read the foregoing Motion and agree to the request of Robert T. Adams, Jr., to be co-counsel with me in the defense in the above styled caused.

CHARLES VAN HOBACK
115 North Market Street
Salem, Virginia 24153
703-387-2699

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Authority to Appeal as Co-Counsel was personally delivered to John N. Lampros, Attorney for the Commonwealth, Courthouse, Salem, Virginia, this _____ day of July, 1981.

CHARLES VAN HOBACK

HOBACK'S WORK NOTES

Petition for writ of Prohibition

Also, Bob Adams to assists.

* * * Martin * * * security for the telephone company . (Missing parts not readable.)

VIRGINIA: IN THE CIRCUIT COURT FOR
THE COUNTY OF ROANOKE

COMMONWEALTH OF VIRGINIA

VS)(ORDER

ROBERT LAWRENCE PAYNE

This cause came to be heard on the 1st day of December, 1980, and came to the Attorney for the Commonwealth and the defendant, Robert Lawrence Payne, who stands indicted in this Court for a felony, to-wit: Conspiracy to Sell, Give or Distribute or Possess with Intent to Sell, Give or Distribute a Schedule II Controlled Substance(s), as charged in the indictment, by his attorney, Charles V. Hoback.

Whereupon, counsel for the defendant having moved the Court for a production of copies of transcripts produced as a result of recordings of certain intercepted wire communications pursuant to the Orders of this Court of July 30, 1980, and August 29, 1980, and there being no objection by the Attorney for the Commonwealth, the Court ORDERS that the Attorney for the Commonwealth shall produce copies of said transcripts of all conversations involving the defendant.

And this case is continued until on or before December 15, 1980, at 10:00 o'clock a. m., in order for counsel for the defendant to advise the Courts as to the manner in which he desires to proceed in this matter.

Enter: 1/8/81
/s/ Judge

ASK FOR THIS ORDER:
/s/ CHARLES V. HOBACK
I HAVE SEEN THIS ORDER:
/s/ JOHN N. LAMPROS

32 Calls

Conversations between Defendant, BETTY KIDD FLORA and the following persons:

NAME	DATE	TIME	TAPE#	PAGE #
Larry Payne	7-02-80	0936 hrs	2	1546 - 1550
Larry Payne	7-02-80	1618 hrs	2 *	1551-1553
Larry Payne	7-03-80	1212 hrs	3	1554-1556
Larry Payne	7-04-80	1116 hrs	4	1557-1560
Larry Payne	7-04-80	1814 hrs	5	1561-1567
Larry Payne	7-08-80	0755 hrs	7	1568-1575
Larry Payne	7-09-80	1057 hrs	8	1576-1587
Larry Payne	7-09-80	1127 hrs	8	1588
Larry Payne	7-11-80	1247 hrs	9	1589-1590
Larry Payne	7-14-80	1210 hrs	11	1591-1592
Larry Payne	7-16-80	0510 hrs	14	1593-1585
Larry Payne	7-16-80	2338 hrs	15	1599-1601
Larry Payne	7-16-80	1500 hrs	15	
Larry Payne	7-17-80	1231 hrs	15	1602-1603
Larry Payne	7-18-80	1012 hrs	16	1604-1605
Larry Payne	7-20-80	0036 hrs	17	1606-1607
Larry Payne	7-24-80	1130 hrs	21	1608-1611
Larry Payne	7-24-80	1200 hrs	21	1612-1614
Larry Payne	7-24-80	1218 hrs	21	1615-1616
Larry Payne	7-25-80	1847 hrs	22	1617-1621
Larry Payne	7-26-80	1020 hrs	23	1622
Larry Payne	7-26-80	1043 hrs	23	1623
Larry Payne	7-28-80	0930 hrs	24	1624-1625
Larry Payne	7-28-80	1627 hrs	24	1626-1627
Larry Payne	7-29-80	1019 hrs	24	1628-1630

Larry Payne	7-29-80	1026 hrs	24	1631-1632
Larry Payne	7-31-80	1257 hrs	25	1633-1636
Larry Payne	8-01-80	1653 hrs	26	1637-1640
Larry Payne	8-13-80	1359 hrs	28	1641-1643
Larry Payne	8-24-80■	1547 hrs	33	1644-1646
Larry Payne	8-27-80■	1949 hrs	35	1647
Larry Payne	8-30-80■	1830 hrs	38	1648-1650

■Payne
re-admitted to
hospital on
8\25\80

Wife left
April 1980

10,000 fine
2 yrs

24,25,26

NOTE: Asterisk denotes surveillance. Two asterisks denotes surveillance and photographs.

IN THE CIRCUIT COURT
IN AND FOR ROANOKE COUNTY

IN re ROBERT LAWRENCE PAYNE,
Affient

STATE OF VIRGINIA)
) ss AFFIDAVIT OF
County of Roanoke) ROBERT LAWRENCE PAYNE

I, Robert Lawrence Payne being duly deposed and state:

1) My name is Robert Lawrence Payne and I am competent to testify herein.
2) In 1980, whlle awaiting trial in the case of Commonwealth of Virginia v. Robert Lawrence Payne I made attempts to prove my innocence of conspiracy to distribute drugs.
3) Some of thoese attempts were to obtain copies of my phone records from Southern Bell Telephone in the State of Florida, and I received copies from January 1980 until September 1980. Upon receiving those copies I found one months had been obmitted, specifically the month of July, 1980. I was angry about this and called the head of security for Southern Bell in Fort Lauderdale, Florida.
4) A second time I received the phone records, and that time one week in July was missing. That request was made two months later. I therefore insisted on speaking with someone, so a gentleman was put on the line, and I explained to him what happened, and how angry I was after two attempts to get my phone records, I still haden't gotten them, and that it was my belief that certain calls were being purposely withheld. The gentleman told me that a Mr. Martin of the C&P Telephone Company in Roanoke and the Virginia State Police had specifically requested that they withhold said records from me. I told this gentleman that I was of the belief that a conspiracy was

on-going to deprive me of proof, and I had advised him to get the records to me, or that I would tell the Jugde in Roanoke County.

5) The night before I was to go to court, or August 3rd, 1981, I received a phone call at my residence in Vinton at approximately 9:00 P.M.

6) The caller was a male, and and he asked "is this Robert Lawrence Payne?" I said "yes." He asked, "does your kids drive a yellow 1957 Cheve to school?" I said "yes." He then sated "It would be a dam shame to get that pretty little car laying in a ditch tore all to hell, especially with them in it. The best thing for your to do, is to go to Court tomorrow, keep your mouth shut, and let your attorney do the talking."

7) The following moringing I advised Charles Hoback of the threat, to see his reaction, and Hoback acted like he diden't hear me.

I further saieth naught.

I Robert Lwrence Payne declare under penalty of perjury that the foregoing is true and correct. Executed this ___ day of _____, 1993.

/s/
Robert Lawrence Payne

State of Kentucky)
) ss:
County of Clay)

SWORN & SUBSCRIBED before me a Notary Public in and for the County of clay, State of Kentucky on this ____ day of _____, 1993.

_____
Lula Cress, Notary Public
My Commission Expires _____